United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7210

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P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[illegible]LA LEE BLOWERS, individually and on behalf [illegible] all other persons similarly situated,

Plaintiff-Appellant,

PATRICIA LOUGHNEY, et al.,

Plaintiffs-Appellants,

MARY NAGEOTTE, et al.,

Plaintiffs-Appellants,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Applicant for Intervention-Appellant,

v.

LAWYERS COOPERATIVE PUBLISHING COMPANY, INC., et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOS. 75-7210, 75-7211,
75-7212, 75-7215

EULA LEE BLOWERS, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant,

PATRICIA LOUGHNEY, et al.,

Plaintiffs-Appellants,

MARY NAGEOTTE, et al.,

Plaintiffs-Appellants,

EQUAL EMPLOYMENT OPPORTUNTIY COMMISSION,

Applicant for Intervention-Appellant,

v.

LAWYERS COOPERATIVE PUBLISHING COMPANY, INC., et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

ISSUE PRESENTED

Whether the district court abused its discretion in denying the Equal Employment Opportunity Commission's motions to intervene in the instant actions.

STATUTES INVOLVED

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000e (f)(1)(Supp.II, 1972), provides:

> (f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such a charge or the expiration of any period of reference under subsection (c) or (d) whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named

in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Rule 24, Federal Rules of Civil Procedure, provides:

INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application

may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. §2403.

STATEMENT OF THE CASE

This is an appeal from three orders of Judge Harold P. Burke of the United States District for the Western District of New York denying the motions of the United States Equal Employment Opportunity Commission (hereinafter "the Commission") to intervene in three sex discrimination actions (now consolidated) brought by private individuals under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. II, 1972) §2000e et seq.

The first of these actions was brought by Eula Lee Blowers, individually and on behalf of all other persons similarly situated, against Lawyers Cooperative Publishing Company, Inc., and various of its officers on January 29, 1973. Plaintiff Blowers is a female former employee of defendant company, the nation's second largest publisher of legal books, employing

approximately 1000 persons (Appendix 180, 223). In her complaint plaintiff Blowers alleged that defendants discriminated against women in all phases of employment activity, including discharge, retaliation, job classification and assignment, recruitment, hiring, promotion, transfer, compensation, training, maternity leave, other employee benefits, and terms and conditions of employment (App. 5). Defendants answered on February 20, 1973, with general and specific denials of liability. Efforts at discovery were commenced and numerous discovery motions were subsequently made before the court, with both sides alleging unreasonable positions and obstructive tactics on the part of the other (App. 20, 35, 36,57, 67, 74, 78, 122, 130, 132, 139, 179, 184, 195, 200, 203). None of these orders had been ruled on when the Commission filed its motion to intervene in the Blowers action on October 25, 1974 (App. 212). The only formal discovery that had been completed was two days of depositions of plaintiff Blowers by defendants' attorneys.[1/]

1/ Also delaying discovery was defendant company's suit to prevent disclosure of information as to defense contract compliance. Record references to this suit, Lawyers Cooperative Publishing Company v. Schlesinger, et al., Civil No. 1974-212 (W.D. N.Y. April 22, 1975), in which plaintiffs intervened, are oblique (App. 223, 225), as the action was before the same judge as the instant cases, and he was fully cognizant of their relationship.

By motion of April 3, 1973 (App. 59), defendants opposed the plaintiff's maintenance of a class action. By order of November 6, 1973 (App. 117), the court postponed determination of the issue. Hearings were held on the class action question on May 20, 1974, and September 20, 1974, but as of this date there has been no ruling.

The Lougney and Nageotte cases involved plaintiffs (female employees of defendant company and the Genesee Valley Chapter of the National Organization for Women) who had originally sought to be added as plaintiffs in the Blowers action (App. 97), but, who, when the court failed to act on that request, filed their own lawsuits before their own filing periods under Section 706(f)(1) would have expired. The Loughney action, filed May 14, 1973 (App. 260), and the Nageotte action, filed July 12, 1973 (App. 453), raised issues essentially similar to those raised in the Blowers case, and plaintiffs in both actions are represented by the same counsel as in Blowers. The Loughney and the Nageotte actions met discovery problems similar to those met in Blowers, with the result that, as of the filing of the Commission's motion in Blowers, no formal discovery whatever had been completed.2/

2/ For the reasons stated infra we regard the date of the filing of the Commission's motion to intervene in Blowers as the relevant date for determining the appropriateness of the Commission's intervention in all three actions. In any

(Footnote continued)

The Commission became aware of the Blowers action shortly after its inception. In April, 1973, the Commission moved to file a memorandum as amicus curiae addressed to the question of the maintainability of the class action (App. 115). In July and November, 1973 the Commission participated as amicus curiae in the Loughney and Nageotte actions on the question of whether the National Organization for Women was a proper party (App. 280, 453). Throughout the pendency of these litigations the Commission's attorneys were in contact with counsel for the various plaintiffs and were kept abreast of the progress of the litigations (App. 412).

After the Commission had observed the limited progress of these litigations, and after sufficient information became available for the Commission to determine the factual basis for the allegations in plaintiff's complaint, the Commission's General Counsel certified the case to be of general public importance. The Commission then moved to intervene in the Blowers action by motion filed October 25, 1974 (App. 212). In its complaint the Commission raised essentially the same issues as were raised in the Blowers complaint (App. 216).

2/ (Footnote Continued)
case, the only discovery which subsequently transpired in either of these two actions, after the Commission moved to intervene in Blowers, and before it moved to intervene in these two actions, was plaintiffs' answering of defendant's first interrogatories in Loughney (App. 344). These answers were cursory, since, as they indicate, defendant had not yet released to plaintiffs sufficient information for them to adequately respond.

The Commission did not at that time move to intervene in the Loughney actions because it regarded the three actions as essentially one litigation, which it would move to consolidate if permission to intervene were granted in Blowers. Moreover, the plaintiffs motion of April 10, 1973, that the Loughney and Nageotte plaintiffs be added as named plaintiffs in Blowers (consented to by defendants on March 11, 1974 (App. 131)) was still outstanding (App. 402-03). However, since the Loughney case was moving into discovery before decision on the intervention motion in Blowers, the Commission, on February 6, 1975, moved to intervene in Loughney and Nageotte, renewed its motion to intervene in Blowers, and moved to consolidate the three actions (App. 232-53).[3/]

Plaintiffs vigorously supported the Commission motion to intervene arguing, inter alia, that there would be no delay because the Commission was already familiar with the case, that, in fact, threshhold issues of the cases were yet to be decided, and that counsel for plaintiffs and for the Commission could coordinate further discovery efforts.

3/ Because of the imminence of the Loughney depositions, the Commission moved to be permitted to participate in them on January 21, 1975 (App. 383). This motion was denied when the motion to intervene was denied on February 21, 1974 (App. 416).

Plaintiffs also noted that Commission participation should allay concerns expressed by defendants that plaintiff's counsel as a sole practitioner could not adequately represent the purported class (App. 221-24, 410-13).

Defendants objected to Commission intervention stating that the Commission had not contacted officers of defendant to investigate charges of discrimination and could not bring any special knowledge into the action. More generally, they argued that the Commission's presence would not aid in the adjudication of the lawsuit, that the Commission's motion was untimely, and that intervention would delay the lawsuit (App. 226-31, 414, 461).

The court denied the Commission's motions to intervene on February 21, 1975 (App. 254, 415, 462).[4/] The court stated the following reasons for its ruling (App. 255):

> Intervention would not protect any interest not already protected. The Commission expressly recognizes and emphasizes in its memorandum in reply to defendant's opposition to this motion (page 3) that it considers plaintiff's counsel competent to litigate this action. There is a danger that intervention may reopen or duplicate discovery that has already occurred. There is a danger that intervention may result in different views between plaintiff's counsel and the Commission, particularly as to possible appeals, which will delay the action. On page 2 of the memorandum referred to above, it is stated that the resolution of these questions (of general public importance) should not be left to the predilections of private parties.

4/ By order of the same date the court granted the motion to consolidate the three actions (App. 256).

If the Commission is desirous of making available to plaintiff's counsel its expertise and advice, it may do so as amicus curiae.

ARGUMENT

INTRODUCTION

The Commission recognizes that the denial of an application for permissive intervention is reversible only upon a showing of an abuse of discretion. Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co., 331 U.S. 519, 524-25 (1947); Fox v. Glickman Corp., 355 F.2d 161 (2d Cir. 1965). We are also aware that, as this Court has observed, no court has reversed a denial of permissive intervention solely for an abuse of discretion. Securities and Exchange Commission v. Everest Management Corp., 475 F. 2d 1236, 1240 (2d Cir. 1972).

However, we believe that in this case the district court applied an improper standard in exercising its discretion. See Neusse v. Camp, 385 F.2d 694, 704 (D.C. Cir. 1967). It failed to give proper regard to the fact that the Commission's authority to intervene is specifically granted by statute and that it was the intention of Congress that the Commission be the primary enforcer of that statute. The proper rule, we submit, is that, on the filing of a certificate of public importance, the Commission should be

permitted to intervene in a private Title VII action, absent compelling reasons for the denial of intervention. Here, even under a more lenient standard, the court's reasons are insufficient to support its decision, because they are either as a matter of law inadequate bases for the denial of Commission intervention or are irrelevant to the circumstances of this case. They do not justify the preclusion of a government agency's participation in the enforcement of a statute for which it has the primary enforcement responsibility.

I.

THE COMMISSION SHOULD BE PERMITTED TO INTERVENE IN A PRIVATE TITLE VII ACTION ABSENT COMPELLING REASONS TO THE CONTRARY.

A discretionary (or permissive,) right to intervene in private Title VII actions is conferred on the Commission by Section 706(f)(1). Generally a party with such a right will be permitted to intervene, unless "the intervention will unduly delay or prejudice the rights of the original parties." F.R.C.P. 24(b). Also generally, Rule 24(b) calls for liberal construction in favor of allowing intervention of government agencies seeking to protect the public interest. Neusse v. Camp., supra, 385 F.3d at 704-05; Wright & Miller, Federal Practice & Procedure, Section 1912, pp. 548-49 (1972). This general principle should be applied

with particular force to intervention by the Commission in broadly-based Title VII suits, the purpose for which the power of intervention was specifically conferred.

In 1972, Congress was aware that, because of lack of resources and other reasons, primary reliance upon private individuals for court enforcement of Title VII had rendered that enforcement (as well as the Commission's conciliation efforts) largely ineffective.[5/] Consequently, in the Equal Employment Opportunity Act of 1972, Congress, gave the Commission power to sue in its own name. It intended to place primary reliance for court enforcement on the Commission. As stated in the Section by Section analysis to Section 706(f)(1):

> It [was] hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC. ...

118 Cong. Rec. 7168 (1972)

5/ S. Rep. No. 92-415, 92d Cong., 1st Sess., pp. 5,6,17 (1971), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, Committee on Labor and Public Welfare, Subcommittee on Labor, 92d Cong, 2d Sess. (1972), at p. 410 f.f. The Report specifically noted(p.8, Legislative History, p. 417):

> . . . Particularly disillusioning has been the Congressional establishment of the EEOC without adequate enforcement; it has, in most respects, proved to be a cruel joke to those complainants who have in good faith turned to the Federal government with the complaint of discrimination only to find, after a lengthy investigatory and conciliatory process, that the Government cannot compel compliance.

The statute itself also indicated the primacy of the Commission's enforcement authority and responsibility by specifically precluding the private lawsuit until the Commission has had the first opportunity to bring suit during the 180-day period after the filing of a charge.

Aware of the often lengthy delays in the Commission's disposition of charges, however, Congress thought it appropriate to retain the private right of action. It thought that, "as the individual's rights to redress are paramount under the provisions of Title VII, it is necessary that all avenues be left open for quick and effective relief." Id. In those suits filed by private individuals which the General Counsel determined to be of general public importance, the Commission was authorized to intervene upon timely application.

Retention of the private right of action, with discretionary authority of the Commission to intervene, was an effort to accommodate the need to permit private parties to avoid the possible delays resulting from the Commission's backlogged administrative process with the recognition of the heavy overtones of public interest in every Title VII litigation which the Commission was the most appropriate body to promote. As the Fifth Circuit recognized, in Hutchings v. United States Industries, 428 F.2d 303, 311 (5th Cir. 1970):

> [O]nce the judicial machinery has been set in train, the proceeding takes on a public character in which remedies are devised to vindicate the policies of the [1964 Civil Rights] Act not merely to afford private relief to the employee.6/

As that court more recently stated in EEOC v. Louisville & Nashville Railroad Co., 505 F.2d 610, 614 (5th Cir. 1974), in interpreting the relationship of the intervention authority to the issue of whether the Commission may sue more than 180 days after the filing of a charge:

> The Commission's right to bring actions after one hundred and eighty days does not render its right of intervention superfluous. Large groups of employees whom the EEOC is charged with protecting would be bound by judgments entered in class actions brought by private parties. The Commission's right to sue could not prevent this injury, but its right to intervene does.

Since intervention by the Commission in important private actions serves the purpose of protecting the public interest, a function which Congress intended the Commission to serve, it necessarily follows that Congress intended the courts to apply a standard favoring the right of intervention.

6/ See 118 Cong. Rec. 7168 (1972). See also Williamson v. Bethlehelm Steel Corp., 468 F.2d 1201, 1203-04 (2d Cir. 1972); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1361 (6th Cir. 1975); EEOC v. E.I. duPont de Nemours & Co., __F.2d__ No. 74-1677 (3rd Cir., May 9, 1975) (slip op., p. 7)

A liberal standard with respect to intervention also serves the purpose of avoiding, in most cases, the need for duplicative proceedings carried on by private parties and the Commission, a problem that had been a serious concern to the drafters of Title VII. EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1362-63 (6th Cir. 1975); EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975). One court of appeals has gone so far as to hold that, where a private suit has been instituted, the Commission is relegated to the right of intervention and may not bring a separate suit on the same charge even if the Commission suit is more broadly based. EEOC v. Missouri Pacific Railroad Co., 493 F.2d 71 (8th Cir. 1974). While we believe that decision goes too far (see EEOC v. Huttig Sash & Door, supra)[7/], the decision does illustrate the desire of the courts to avoid duplication of actions. Manifestly, if the Commission can protect the public interest only by intervening in a private action, intervention should be liberally allowed.

7/ In Huttig Sash, the Fifth Circuit said (511 F.2d at 455):

> We are convinced that Congress meant to avoid duplicative proceedings by limiting the EEOC to permissive intervention when the EEOC raises no substantially different issues and seeks no relief other than for the private party. An entirely different situation exists when the EEOC uses the filing of a charge simply as a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practice; this investigation might frequently disclose, as in this instance, illegal practices other than those listed in the charge. [Footnote omitted.]

There is no doubt that a broad-based private action can seriously affect the public interest represented by the Commission. While the Commission's interest is no doubt in many respects similar to that of the private litigants, the private action cannot be regarded as necessarily protecting the Commission's interest. See Trbovich v. United Mine Workers, 404 U.S. 528, 538-39 (1972); see also Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-04 (2d Cir. 1972). And while the Commission, suing in the public interest, would not be bound under principles of res judicata by the results of a private action to which it was not a party,[8/] the practical effect of an adverse decision, no matter what the reasons for such decision, could be serious. Moreover, to the extent that all the parties to a class action might be bound by the private action (see EEOC v. Huttig Sash & Door Co., supra, 511 F.2d at 456), the Commission might well be effectively precluded from obtaining what it regards as adequate relief.

8/ Williamson v. Bethlehem Steel Corp., supra; EEOC v. Kimberly Clark Corp., supra, 511 F.2d at 1361.

It is fundamental law that a court must exercise its discretion with proper regard to the purposes of the act imparting such discretion. Hecht Co. v. Bowles 321 U.S 321, 331 (1944); United States v. Hayes International Corp., 415 F.2d 1030, 1044 (5th Cir. 1969). The limitation on the court's discretion has been specifically noted in the context of a discretionary right of intervention.[9/] See Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F.2d 822, 827 (2d Cir. 1963), cert.

9/ The statement in EEOC v. Louisville & Nashville Railroad Co., 505 F.2d 610, 614 (5th Cir. 1974), that the Commission's right of intervention was in fact narrower than ordinary permissive intervention under F.R.C.P. 24(b) was limited solely to the fact that the case must be one of "general public importance." Similarly, the statement in EEOC v. Kimberly Clark Corp., supra, 511 F.2d at 1363, n. 15, that the concept of intervention in Title VII actions should not be expanded beyond its normal meaning was directed solely to the suggestion in EEOC v. Missouri Pacific Railroad Co., 493 F.2d 71, 75 (8th Cir. 1974), that the Commission as permissive intervenor be permitted to expand the scope of a private action. See also EEOC v. Huttig Sash & Door Co., supra, 511 F.2d at 455, n.2.

In fact, the court in Louisville & Nashville, supra, quoted with approval an excerpt from a note in EEOC v. E.I. du Pont de Nemours & Co., 373 F.Supp 1321, 1331, n. 15 (D. Del. 197), affirmed, __ F.Supp__, No. 74-1677 (3rd Cir. May 9, 1975), wherein it was suggested that the reason for making the Commission's authority discretionary was merely to preclude the Commission's intervening to broaden a narrow individual suit and delaying relief to the individual. This concern does not pertain here in a broad class action, especially where plaintiffs desire and support Commission intervention.

denied, 376 U.S. 944 (1964), where this Court held that, where the "tenor and framework of the Rules" called for a contrary approach, the district court was without discretion to limit the claims of a permissive intervenor.[9a/]

While the authority is discretionary, the Commission's interest in a broad class action suit under Title VII is, we submit, of such force that its request to intervene should be granted as a matter of course unless there are compelling reasons against such intervention. Cf. Wolpe v. Poretsky, 144 F.2d 505, 508 (D.C. Cir. 1944), cert. denied, 327 U.S. 777 (1944); Textile Workers of America v. Allendale, 226 F.2d 765, 770 (D.C. Cir. 1955). Such a standard is in line with the general liberality of approach toward permitting government agencies to intervene, and the evolving jurisprudence, applied in the intervention context, whereby "courts should mold their traditional methods to advance the public interest." Neusse v. Camp, 385 F.2d 694, 705-706 (D.C. Cir. 1967).

9a/ See also 3B Moore's Federal Practice ¶24.06 [1] (1974), which states:

> There are certain statutes to be considered in connection with the right to intervene. Some of these are framed in terms which, if literally construed, would be held to give only a permissive right. But it should be remembered that that part of Equity Rule 37 which dealt with intervention was also framed in permissive terms, but that it was construed to give an absolute right to intervene in the situations specified in original Federal Rule 24(a) (2), (3). Therefore in construing statutes which deal with intervention a like construction should be placed upon them when necessary to attain the general objectives of intervention. [Footnotes omitted.]

Wright & Miller, Federal Practice & Procedure, Civil, §1912, pp. 548-549 (1972). See also Berger, Intervention by Public Agencies in Private Litigation in the Federal Courts, 50 Yale L.J. 65 (1940). This Court should make clear that, if the Commission certifies the case to be of general public importance,[10/] and the application is timely, the standard concerning the court's discretion should be to permit intervention unless there are compelling circumstances justifying denial.

10/ Section 706(f)(1) does not provide for review of the General Counsel's determination that a case is of public importance. In Jones v. Holy Cross Hospital, Silver Springs, Inc., 8 FEP Cases 1024, 1028 (D. Md. 1974), the court specifically held:

> "There is no merit in defendant's argument that the court should review the determination of the EEOC that the case is one of general public importance."

See also Odom v. Celanese Fibers Group Co., Civil Action No. C-C-75-55 (W.D. N.C. May 6, 1975); cf. Spangler v. United States, 415 F.2d 1242, 1246 (9th Cir. 1969).

Similarly, courts have held that Title VII did not provide for judicial scrutiny of the Attorney General's finding of reasonable cause prior to the filing of a pattern or practice complaint in federal courts. United States v. Gustin-Bacon Div., Certain-Teed Products Corp., 426 F.2d 539, 543, (10th Cir. 1970); U.S. v. IBEW, Local 683, 270 F. Supp. 233, 234-235 (S.D. Ohio 1967); U.S. v. Building & Constr. Trades Council of St. Louis, Mo., 271 F.Supp.447 (E.D. Mo. 1966).

In any case, the court did not question the determination here, and the public importance of the case is manifest from the record. (See Statement, supra p. 4-5).

II

UNDER PROPER STANDARDS, INTERVENTION SHOULD HAVE BEEN GRANTED IN THESE CASES

A. The special circumstances of these cases support granting of leave to the Commission to intervene.

Apart from the general consideration stated above, there are substantial reasons supporting the Commission's intervention specifically in the instant cases.

The instant actions present challenges to the alleged sexually discriminatory practices of a major publisher of legal materials. Although not yet certified as class actions, they will obviously, as already demonstrated by the record, involve protracted and expensive litigations, affecting the interests of a large number of people. They present issues concerning the treatment of women in professional, supervisory and other higher level positions, areas in which Title VII law has yet to be thoroughly developed. The Commission can make a substantial contribution to the prosecution of these actions because of its resources and expertise. These include technical resources such as computer availability, statistical capability, and the availability of analysts

capable of reviewing large volumes of employment records and data and reducing such data to a clear and meaningful form. Plaintiffs and their counsel, recognizing the numerous advantages of Commission participation, have actively supported Commission intervention.

The financial resources are specially pertinent here, where, notwithstanding the competence of counsel for plaintiffs, this litigation retains the David and Goliath aspect which prompted Congress to give the Commission meaningful enforcement authority.[11/] Plaintiffs' counsel is a single practitioner opposing a large corporation with resources to retain a very large law firm (App. 222-25). The record leaves no doubt that defendant company intends to use its extensive resources to fight each step in this litigation. For example, defendant filed a law suit to prevent disclosure of federal contract compliance information. It is significant that not one of defendants officers was deposed over the first two

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11/ See S. Rep. No. 92-415, p. 17. Legislative History, supra, at p. 426.

years of the litigation. Whatever the reasons for these delays,[12] Commission intervention would assist in moving the litigation forward.

Moreover, these cases contain allegations of retaliation in the form of discharge, criminal charges against a former employee, and general harassment of a class (App. 10-13). These factors further enhance the opportunity for the private litigant of limited resources to be overborne by the resources of the corporate defendant, to the detriment of injured parties and the public at large.

These cases therefore present precisely the type of important private litigation in which Congress expected the Commission to intervene.

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12 / Defendants ascribe the lack of progress to what they characterize as the unreasonable nature of plaintiffs' discovery demands (See App. 200, 399-401). Plaintiffs' efforts seem to us nothing other than a diligent and sincere effort to secure the large mass of information necessary to prosecute a Title VII class action, where conclusions must be based on statistics and comparisons of treatment of various groups and where such information is largely in control of the defendant. If, however, there is any merit to defendants' contentions, it would seem defendants should be pleased that plaintiffs' counsel should have the assistance of an agency expert in such matters, which could aid in directing discovery into only those areas necessarily relevant to the action.

B. The reasons stated by the district court are insufficient to support the denial of the Commission's application to intervene.

None of the reasons stated by the district court support the court's denial of the Commission's intervention. The stated reasons are either general propositions applicable to practically every Title VII litigation, which, if accepted as appropriate reasons for denying intervention, would bar Commission intervention in all but the most extraordinary circumstances; or they are speculative assertions unrelated to the actual circumstances of the case. Each of the court's reasons is analyzed below.

1. "Intervention would not protect any interest not already protected. The Commission expressly recognizes. . . that it considers plaintiff's counsel competent to litigate this action."

This statement is directly contrary to the recognition by this and other courts that employment discrimination actions by the government involve a distinct public interest which is different from the interests of litigants in private actions even when the latter are brought as class

actions. See Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-04 (2d Cir. 1972); EEOC v. Kimberly-Clark Corp., supra 511 F.2d at 1361; EEOC v. E.I. duPont de Nemours & Co., ___F.2d___ No. 74-1677 (3rd Cir. May 9, 1975) (slip opinion, p. 7); United States v. Local No. 3, International Union of Operating Engineers, ___F.Supp.___, 4 FEP Cases 1088, 1093 (N.D. Cal. 1972); United States v. St. Louis-San Francisco Railway Co., 52 F.R.D. 276 (E.D. Mo. 1971). See also Trbovich v. United Mine Workers, 404 U.S. 528, 538-39 (1972), where, in holding that a union member had an absolute right to intervene in an action by the Secretary of Labor brought under the Section 402(b) of the Labor Management Reporting and Disclosure Act, the Court stated:

> The statute plainly imposes on the Secretary the duty to serve two distinct interests, which are related, but not identical. First, the statute gives the individual union members certain rights against their union, and "the Secretary of Labor in effect becomes the union member's lawyer" for purposes of enforcing those rights. 104 Cong. Rec. 10947 (remarks of Sen. Kennedy). And second, the Secretary has an obligation to protect the "vital public interest in

> assuring free and democratic union elections that transcends the narrower interest of the complaining union member." Wirtz v. Local 153, Glass Bottle Blowers Assn., 389 U.S. 463, 475 (1968). Both functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of "his lawyer." Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2).

The court appears to have accepted defendants' argument that as long as plaintiff's counsel was competent, which the Commission insisted was the case (and had so argued on the question of the maintenance of the class action), the Commission's (or public's) interest was protected. That is plainly not the case, as the passage quoted above demonstrates. Moreover, as discussed above, the fact that plaintiff is an adequate representative of the class does not negate the advantages of the Commission's intervention in helping to correct the pronounced imbalance

of the resources of the parties. It can hardly be contended that Congress intended the Commission to be permitted to intervene only when a plaintiff's counsel cannot properly litigate an action.

2. "There is a danger that intervention may reopen or duplicate discovery that has already occurred."

This observation of the district court is simply irrelevant to the actual facts of the instant action. Although the Blowers action had been pending since January 29, 1973, and numerous discovery motions were pending at the time the Commission moved to intervene (and even at the date of the court's order denying intervention), practically no discovery had taken place. The little discovery that had transpired was two days of depositions of plaintiff by defendant. There had been no discovery whatever by plaintiffs of defendants -- the aspect of the discovery in which the Commission would have an interest. There was no possibility of duplication where there was nothing to duplicate.

Moreover, even if some discovery had taken place, any problem of duplication could have been avoided merely by the court's conditioning the Commission's intervention on its taking the case as it found it . Ionian Shipping Co. v. British Law Insurance Co., 426 F.2d 180, 191-192 (2d Cir. 1970). See Galbreath v. Metropolitan Trust Co., 134 F.2d 569, 570 (10th Cir. 1943); In re V-I-D, Inc., 177 F.2d 234, 236 (7th Cir. 1949).

Related to the question of the duplication of discovery is the question of timeliness. Although the court below did not base its decision on lack of timeliness, since it did note the timing of the Commission's motion and defendants did press the issue below, some comment is warranted.

It is true that the Commission's motion was made almost 21 months after the Blowers action was filed. However courts considering timeliness under Rule 24 are consistent in holding that the amount of time that may have elapsed since the institution of the action does not make a proposed intervention untimely. While the

passage of time may be a relevant factor, the critical issue is whether delay caused by the intervention will prejudice the existing parties. Thus, intervention if otherwise appropriate should be allowed where substantial litigation of the issues has not been commenced when the motion to intervene has been filed. Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir. 1971), cert. denied sub nom Trefina v. United States, 400 F.2d 878 (1971); see also Evans v. Lynn, 376 F.Supp. 327, 330 (S.D. N.Y. 1974); Innis, Speider & Co. v. Food Mach. Corp., 2 F.R.D. 261 (D. Del. 1942)[13]; 3B Moore's Federal Practice ¶24.13[1].

As shown above, while there have been extensive discovery motions, many of which were still pending when the Commission's application was denied, there has been

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13/ In Innis, supra at 265, the court found a motion for permissive intervention timely, although the action had been pending for four years, because the case had not been set for trial until the day the motion was filed.

no actual discovery which the Commission would duplicate. Moreover, the Commission's attorneys have been in consultation with plaintiff's counsel throughout the litigation and are well acquainted with the issues and the discovery matters now under consideration by the court. Thus, their intervention in the cases can cause no delays. To the contrary, as noted, Commission intervention, with its resulting technical assistance may well assist in advancing the litigation.

The failure of the Commission to intervene at an earlier date was not negligent. The Commission had participated in the action and kept abreast of its progress from an early date. It was merely not deemed the most appropriate use of Commission resources to intervene. In this regard it must be emphasized that the Blowers action was filed only 10 1/2 months after the Commission had received authorization from Congress to sue (and intervene) in its own right. At that time there was an enormous mass of private Title VII litigation outstanding,

and it was not easily apparent which cases would make the most appropriate intervention vehicles.

Moreover, while the Commission may support a private litigant as amicus curiae on purely legal issues with little to go on but the pleadings, it may not, as a government agency, providently intervene in support of claims without hard information as to the factual bases for the allegations. In the Blowers action, because of defendants' refusal to comply with plaintiff's request for information and refusal to permit the disclosure of federal contract compliance information, it was only shortly before the Commission moved to intervene that sufficient data was released for the Commission to make an informed appraisal of the merits of the action and determine whether the action in fact had the public importance to justify intervention. It promptly moved to intervene upon making this determination, still well in advance of any substantial litigation of the issues. Any delay in these circumstances is, we think, excusable. See Smith Petroleum Service Inc. v.

Monsanto, 420 F.2d 1103, 1115—1116 (5th Cir. 1970).

3. "There is a danger that intervention may result in different views between plaintiff's counsel and the Commission, particularly as to possible appeals, which will delay the action. . . [The Commission states] that the resolution of these questions (of general public importance) should not be left to the predilections of private parties."

If there were some evidence that the Commission and the plaintiff's counsel were seriously at odds about the conduct of the litigation, there might be some merit to this objection. On the contrary, however, the Commission and plaintiffs' counsel have throughout the litigation, with the Commission participating as amicus curiae, cooperated fully, as demonstrated by the enthusiastic support of plaintiffs for Commission intervention.

Insofar as there are possibilities for disagreement, this could be said of any intervention. Indeed the possibility for differences in approach is one of the recognized reasons (see supra) for Commission participation for the protection of the public interest. A factor that is

inherent in the very nature of the Commission's intervention authority can hardly be used as a reason for denying that intervention.

4. "If the Commission is desirous of making available to plaintiffs counsel its expertise and advice, it may do so as amicus curiae."

Status as amicus curiae in this case would be insufficient for the Commission to protect the public interest in the elimination of employment discrimination. The effect of a completed intervention is to make the intervenor a party in the action. It is only as a party that the Commission can provide the court with the research and expertise necessary to prepare for trial.

As amicus curiae the Commission may not tender any evidence nor can it guarantee that discovery will proceed along lines it deems essential to develop the evidence

necessary to correctly illumine the issues at trial.[14/] Neusse v. Camp, supra, 385 F.2d 704, n. 10. Furthermore, the court has no reason to pass upon a point made in an amicus brief or oral argument, but not advanced by the party being supported by the amicus. Knetsch v. United States, 364 U.S. 361 (1960). The Commission cannot adequately protect the public interest if its views may be ignored.

14/ As one proponent of the amendments to Rule 24(b) stated:

> But the status of an amicus curiae does not give the Government sufficient freedom in developing its presentation. . . rarely may [an amicus curiae] present evidence, and though he generally may submit a brief, the court may disregard it. The Government thus would be handicapped, for example, in any attempt to furnish the actual economic and industrial background, expecially for the purpose of formulating the decree, which was considered by TNEC [The Temporary National Economic Committee whose work was instrumental in promoting the amendment to Rule 24(b)] the primary justification for the Government's intervention into the action. (Federal Intervention in Private Actions Involving the Public Interest, 65 Harv. Law Rev. 319, 327 (1951).)

An intervenor also has a right to appeal from the final decree whereas an amicus has no such right.[15/] This may be important. There can be aspects of Title VII litigation where a private plaintiff may not have a sufficient interest or sufficient resources to pursue an appeal from an adverse decision which may have significant impact on Title VII generally. The Commission ought to have the right to determine whether an appeal is warranted in the public interest.

15/ An amicus might possibly obtain leave of court to intervene and appeal after judgment. See Neusse v. Camp, supra, 385 F.2d 709, n. 10. However, even if such leave was granted, it would be of little avail where critical evidence was not developed at trial.

Since therefore there are valid reasons for allowing intervention in the present actions and no scund reasons for denial, the court, if it had exercised proper standards, would have had to permit intervention in these cases.

CONCLUSION

For all the reason stated above we respectfully submit that the order denying intervention should be reversed and the lower court instructed to permit the Commission's intervention in these consolidated actions.

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CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing brief of the United States Equal Employment Opportunity Commission, as appellant, have this day been mailed, postage prepaid, to the following counsel of record.

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